(1) Supreme Court, U.S.
FILED
991904 MAY 25 2000
No. _____
OFFICE OF THE CLERK

In The

Supreme Court of the United States

I&M RAIL LINK,

Petitioner,

v.

NORTHSTAR NAVIGATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street N.W.
Washington, D.C. 20006
(202) 736-8000

WESTON W. MARSH*
MICHAEL J. SCOTTI, III
FREEBORN & PETERS
311 South Wacker Drive
Suite 3000
Chicago, IL 60606-6677
(312) 360-6000

Counsel for Petitioner

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5299

QUESTION PRESENTED

The Truman-Hobbs Act (the "Act"), authorizes the Coast Guard to order bridge owners to alter bridges when they "unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. §§511-524. The Act was adopted to provide federal funding for the reconstruction of railroad bridges.

A separate federal statute, also administered by the Coast Guard, authorizes the location and the precautionary warnings for all stationary objects that obstruct navigation, including bridges. 33 U.S.C. §401. The bridge involved in this case was duly authorized and was constructed in accordance with the permits issued pursuant to this statute. On May 5, 1996, a marine vessel pushing twelve barges approached the Sabula Bridge at an angle and hit the open bridge in full daylight.

The issue presented is:

Whether findings made to support Truman-Hobbs Act funding should invalidate the legal authority to occupy space in navigable waters which is otherwise granted by a Coast Guard permit, thereby transferring the obligation to avoid bridge-vessel allisions away from river pilots and marine vessels and placing that obligation on bridge owners who have no ability to control navigational safety.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a Delaware Limited Liability Company that is wholly owned by I & M Holdings, LLC, also a Delaware Limited Liability Company, and the Soo Line Railroad Company, Inc., a Minnesota Corporation. No publicly traded company directly owns 10% or more of the petitioner's stock. However, the Soo Line Railroad Company is wholly owned by the Canadian Pacific Railway Company, which is a publicly owned company in Canada.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 8

I. Because Most Allisions in the Western Waterways Involve Truman-Hobbs Act Bridges, the Appellate Court's Decision Causes a Profound Reversal of the Rules of Admiralty Law With Harmful Consequences 10

II. Because Safety on the Waterways is Controlled Under Section 401 (Permitting), the Unprecedented Construction of Section 512 as a Safety Statute Disrupts the Coast Guard's Regulation of Safety on the Waterways 15

III. The Court of Appeals' Decision Defeats the Legislative Purposes of the Truman-Hobbs Bridge Act of 1940 and Disrupts the Balance Established Between Two Competing Modes of Transportation 22

IV. The Appellate Court's Decision Creates A Conflict Among the Circuit Courts of Appeals 27

CONCLUSION 30

TABLE OF CONTENTS – Continued

Page

APPENDIX

Appendix A
Seventh Circuit Opinion, January 5, 2000.....App. 1

Appendix B
District Court Memorandum and Order Granting Petitioner's Motion for Partial Summary Judgement, dated April 21, 1999 .....App. 9

Appendix C
Seventh Circuit Order Denying Petition for Rehearing and Request for *En Banc* Review, February 25, 2000 .....App. 13

TABLE OF AUTHORITIES

Page

CASES

Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981) 27

Boudoin v. J.R. McDermott & Co., 281 F.2d 81 (5th Cir. 1960) 20

Cappellini v. McCabe Powers Body Co., 713 F.2d 1 (2nd Cir. 1983) 20

Folkstone Maritime, Ltd., v. CSX Corp., 64 F.3d 1037 (7th Cir. 1995) 18

Greenman v. Yuba Power Products, 377 P.2d 897 (Ca. 1963) 20

In re Great Lakes Towing v. Motorship Boku Maru, 348 F. Supp. 549 (N.D.Ill. 1972), *aff'd sub nom.*, 505 F.2d 579 (7th Cir. 1974) 17

In Re Wasson, 495 F.2d 571 (7th Cir. 1980) 12

Illinois Constructors Corp. v. Logan Transportation, Inc., 715 F. Supp. 872 (N.D.Ill. 1996) 13, 19

Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 104 S. Ct. 304 (1983) 25

Patapsco Scrap Corp. v. Maryland Shipbuilding & Drydock, Co., 268 F.2d 817 (4th Cir. 1959) 20

Seaboard Airline Co v. Pan American Petroleum & Trans. Co., 199 F.2d 761 (5th Cir. 1952) 28

Texas & P. Railway Co. v. Angola Transfer Co., 18 F.2d 18 (5th Cir. 1927), *cert. denied*, 275 U.S. 534 (1927) 29

The Louisiana, 70 U.S. 164, 3 Wall. 164 (1865) 13

TABLE OF AUTHORITIES – Continued

Page

The Oregon, 158 U.S. 186, 15 S. Ct. 804 (1895) ... *passim*

The Pennsylvania, 86 U.S. 125, 19 Wall. 125 (1873) 11, 12, 14

United States v. Texas, 507 U.S. 529, 113 S. Ct. 1631 (1993) 25

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1331(1) 7

33 U.S.C. §401 ..... 1, 5, 7, 15, 16, 18, 22

33 U.S.C. §511 ..... 2, 6, 16, 28

33 U.S.C. §512 ..... 2, 6, 15, 16, 18

33 U.S.C. §513 ..... 3, 6, 16, 17

REGULATIONS

33 C.F.R. §114.01 16

33 C.F.R. §114.10 ..... 5, 16

33 C.F.R. §116.3 17

33 C.F.R. §116.40 17

OTHER AUTHORITIES

86 Cong. Rec. 8647 (1940) 22, 23

86 Cong. Rec. 8653 (1940) 26

OPINIONS BELOW

The opinions of the Court of Appeals for the Seventh Circuit, that first reversed the district court, and then denied the petition for rehearing, are reported at 198 F.3d 1012 (7th Cir. 2000) and 205 F.3d 333 (7th Cir. 2000) respectively. The opinion of the United States District Court, Northern District of Illinois, Western Division, granting summary judgment in favor of Petitioner, was not published but is included in Appendix A at 1 and 2. The opinion of the United States District Court, Northern District of Illinois, Eastern Division, addressing personal jurisdiction and venue issues, is reported at 21 F. Supp. 2d 849 (N.D. Ill. 1998).

JURISDICTION

The court of appeals issued its Opinion on January 5, 2000. On January 19, 2000, petitioner filed a Petition for Rehearing En Banc. United States Court of Appeals denied the request for a hearing on February 25, 2000. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. §401

> §401. Construction of bridges, causeways, dams or dikes generally; exemptions
>
> It shall not be lawful to construct or commence the construction of any bridge . . . over . . .

any . . . navigable river . . . of the United States until the Consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge . . . shall have been submitted to and approved by the Secretary of Transportation. . . . When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army.

33 U.S.C. §511. Definitions

* * *

The term "bridge" means a lawful bridge over navigable waters of the United States, including approaches, fenders, and appurtenances thereto, which is used and operated for the purpose of carrying railroad traffic, or both railroad and highway traffic, or if a State, county, municipality, or other political subdivision is the owner or joint owner thereof, which is used and operated for the purpose of carrying highway traffic.

33 U.S.C. §512. Obstruction of navigation

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

33 U.S.C. §513. Notice, hearings, and findings

Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall be the duty of the Secretary, after notice to interested parties, to hold a hearing at which the bridge owner, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and any other party or parties in interest shall have full opportunity to offer evidence and be heard as to whether any alteration of such bridge is needed, and if so what alterations are needed, having due regard to the necessity of free and unobstructed water navigation and to the necessities of the rail or highway traffic. If, upon such hearing, the Secretary determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, having due regard also for the necessities of rail or highway traffic thereover, he shall so find and shall issue and cause to be served upon interested parties an order requiring such alterations of such bridge as he finds to be reasonably necessary for the purposes of navigation.

33 U.S.C. §516. Apportionment of cost

At the time the Secretary shall authorize the bridge owner to proceed with the project, as provided in section 515 of this title, and after an opportunity to the bridge owner to be heard thereon, the Secretary shall determine and issue an order specifying the proportionate shares of the total cost of the project to be borne by the United States and by the bridge owner. Such

apportionment shall be made on the following basis: The bridge owner shall bear such part of the cost as is attributable to the direct and special benefits which will accrue to the bridge owner as a result of the alteration, including the expectable savings in repair or maintenance costs; and that part of the cost attributable to the requirements of traffic by railroad or highway, or both, including any expenditure for increased carrying capacity of the bridge, and including such proportion of the actual capital cost of the old bridge or of such part of the old bridge as may be altered or changed or rebuilt, as the used service life of the whole or a part, as the case may be, bears to the total estimated service life of the whole or such part: Provided, That in the event alteration or relocation of any bridge may be desirable for the reason that the bridge unreasonably obstructs navigation, but also for some other reason, the Secretary may require equitable contribution from any interested person, firm, association, corporation, municipality, county, or State desiring such alteration or relocation for such other reason, as a condition precedent to the making of an order for such alteration or relocation. The United States shall bear the balance of the cost, including that part attributable to the necessities of navigation: And provided further, That where the bridge owner proceeds with the alteration on a successive partial bid basis the Secretary is authorized to issue an order of apportionment of cost for the entire alteration based on the accepted bid for the first part of the alteration and an estimate of cost for the remainder of the work. The Secretary is authorized to revise the order of apportionment

of cost, to the extent he deems reasonable and proper, to meet any changed conditions.

33 C.F.R. §114.10 General policies on issuance of permits and drawbridge operation regulations.

* * *

The decision as to whether a bridge permit or a drawbridge operation regulation will be issued or promulgated must rest primarily upon the effect of the proposed action on navigation to assure that the action provides the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment.

* * *

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. Petitioner owns a short line railroad located in the States of Illinois, Iowa, Wisconsin, Minnesota and Missouri. Petitioner's rail line includes the Sabula Railroad Bridge, at milepost 535, which is a swing span bridge that crosses the upper Mississippi River. Respondent is a barge line that operates commercial towboats, including one named the Motor Vessel Megan Beesecker, on the upper Mississippi River. On May 5, 1997, the Megan Beesecker struck the Sabula Railroad Bridge in broad daylight as it attempted to pass through its open channel when descending the river.

At the time of the accident, the bridge was in clear view and had been properly permitted by the U.S. Coast Guard on April 25, 1996, pursuant to the U.S. Coast Guard's permit process under 33 U.S.C. §401. The factual

situation of a moving vessel colliding with a stationary bridge, which admirality cases call an allision, gives rise to a presumption that the stationary object was not at fault and that the moving vessel caused the allision. *The Oregon*, 158 U.S. 186, 15 S.Ct. 804 (1895). Under admiralty law, this presumption is commonly referred to as the *Oregon Rule*. When the stationary object is in compliance with its Coast Guard permit, this rule has been applied to protect stationary objects, which have no control over safety at the scene of the accident and frequently cannot even produce an eyewitness to the allision.

On June 17, 1996, the Coast Guard issued an "Order to Alter" the Sabula Bridge pursuant to its authority under the Truman-Hobbs Bridge Act. 33 U.S.C. §§511-23. The Truman-Hobbs Act gives the U.S. Coast Guard the ability to regulate the alteration of bridges located in navigable waters and provides federal funding for railroads whenever the removal or alteration serves the benefit of the public and marine traffic rather than the railroad. As required with Truman-Hobbs bridge inquiries, on September 25, 1995 the Coast Guard prepared a report regarding the Sabula Railroad Bridge that recommended the bridge's two separate channels be combined into one large channel. The Seventh Circuit held that the findings in this Report (*i.e.*, that the bridge qualifies as an "unreasonable obstruction to navigation"), were "more than adequate to overcome the *Oregon's* presumption." (App. 8) The Appellate Court made this ruling despite the fact that the Coast Guard issued a permit accurately charting the position of the bridge on the Mississippi River and expressly authorizing, pursuant to

33 U.S.C. §401, its continued existence in its current condition as of April 26, 1996, six months after the report dated September 25, 1995. (App. 2, 3)

The "Order to Alter" did not set forth any date for completion of the alterations. The Bridge Administrator of the Eighth Coast Guard District, by direction of the District Commander, confirmed on May 1, 2000, that the existing bridge permit issued on April 26, 1996 " . . . is valid and there is no action pending that requires a permit amendment."[1] Thus, there is no dispute that the bridge was duly licensed and permitted both before and after the Truman-Hobbs Act findings. The Coast Guard has not yet requested petitioner to make any alterations to the bridge.

The district court had jurisdiction over the original action pursuant to the court's admiralty and maritime jurisdiction, pursuant to 28 U.S.C. §1333(1). Petitioner filed a motion for summary judgment, based upon the *Oregon Rule*, claiming that there was no genuine issue of material fact as to liability in that respondent failed to rebut the presumption in favor of the stationary bridge. On April 21, 1999, the district court entered an order granting summary judgment as to liability based upon its finding that, after reviewing all the evidence presented, respondent failed to present evidence that it acted with reasonable care when navigating the Sabula Bridge and that the bridge was in full compliance with its permit. (App. 10, 11)

---

[1] The Bridge Administrator that signed the May 1, 2000 letter was the same individual who signed the order to alter dated June 17, 1996.

The court of appeals reversed the district court's order granting summary judgment in favor of petitioner. Giving no deference to the Coast Guard permit or attaching any legal significance to the fact that the bridge was an authorized obstruction constructed in full compliance with a Coast Guard permit at the time of the allision, the Court below relied solely upon the Truman-Hobbs Act report as "more than adequate to overcome *The Oregon's* presumption." (App. 8)

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case profoundly undermines the century-old rules that have governed bridge owners' and boat operators' responsibilities for promoting safe navigation on waters subject to the federal government's plenary authority. One effect of the holding below will be to seriously impair safety on navigable waters by weakening the boat operator's absolute duty to avoid allisions with a bridge. A second effect will be an explosive increase in federal court litigation. Heretofore, it has been understood that the barge operator bore liability for allisions on structures that had received federal permits. Now the barge operators have a new defense that will require costly litigation under unclear federal common law standards. The costs to litigants and federal courts will be significant. These untoward effects are alone sufficient to warrant review by this Court. The fact that the court of appeals created this situation by modifying settled common law standards without any evidence that Congress clearly intended that outcome makes review by the Court absolutely vital.

There are currently thirteen bridges throughout the United States with a Truman-Hobbs Act "Order to Alter" pending. On average, these bridges have been waiting for federal funds for over five years. Only eight of these railroad bridges have received any funds for design or construction and not one of these projects has been fully funded. The Sabula Bridge project has not received any funding at this time. Over the past ten years, there have been approximately 2,000 documented allisions at these bridges. As a general rule, in the absence of active negligence on the part of bridge owners, the *Oregon Rule* applied to each of these allisions, and indeed was applied by the trial court in this case. Reversing the district court, the court of appeals altered this long-standing liability principle of admiralty law for passive structures, thereby setting rules of civil responsibility which will disrupt the Coast Guard's regulation of marine traffic, thwart the true purpose of the Truman-Hobbs Act and potentially endanger vital train service.

The legislative history does not indicate that the Truman-Hobbs Act was intended to change admiralty's common law. The clear purpose of the Truman-Hobbs Act was to relieve the railroads from the harsh and undue financial burden of paying for capital improvements to improve bridges for marine traffic. The Act attempts to balance the interests between two competing modes of transportation – rail and marine traffic – by relieving one mode of the duty to subsidize the other. That balance was successfully maintained for 59 years, but was suddenly and improperly disrupted by the Seventh Circuit's opinion.

The decision of the court of appeals not only deviates from the intent of the Truman-Hobbs Act but also creates an environment that discourages safe navigational practices, which will inevitably increase damage to bridges, marine traffic, marine cargo and personal injury to seamen. The need for judicial guidance from this Court is immediate. There will be hundreds of allisions at Truman-Hobbs Act bridges every year. The issue of civil liability associated with Truman-Hobbs Act funding is one of exceptional national importance affecting this nation's navigable waterways, and its rail and marine transportation systems.

I.

Because Most Allisions in the Western Waterways Involve Truman-Hobbs Act Bridges, the Seventh Circuit's Decision Causes a Profound Reversal of the Rules of Admiralty Law With Harmful Consequences

Foreseeable implications of the ruling below will eviscerate the Rule of *The Oregon* in all Truman-Hobbs situations, and will have profound effects upon safety in the navigable waters of the United States, most particularly in the upper Mississippi River. For example, the six bridges that qualified for federal funding under the Truman-Hobbs Act along the upper Mississippi River were involved in 73% of the allisions ocurring in that navigable waterway.

Allisions on the Upper Mississippi River
1976 – 1996
(From Cairo, Missouri – North)

	Number	Number of Allisions	Percentage of Allisions
Qualified Bridges	6	1,353	73%
Other Bridges	18	499	27%
Total Bridges	24	1,852	100%

Throughout the Coast Guard's entire Western River Operations area, there are eight qualified bridges. These eight bridges account for 52.4% of the allisions on the navigable waterways in the Western River Operations area as follows:

Allisions on the Western River Operations
1976 – 1996

	Number	Number of Allisions	Percentage of Allisions
Qualified Bridges	8	2,300	52.40%
Other Bridges	48	2,064	47.60%
Total Bridges	56	4,364	100.00%

Because the court of appeals considered and applied the Truman-Hobbs Act as if it were a navigational statute, rather than a funding statute, mariners and barge lines will hereinafter seek to invoke the rule set forth in *The Pennsylvania*, 86 U.S. 125, 19 Wall. 125 (1873). This rule, like the rule of *The Oregon*, is a long-standing principle of admiralty law. Under the rule of *The Pennsylvania*, a stationary object that is found to be in violation of a navigational statute is automatically presumed to be at fault for any allision. However, the rule does not only require a

presumption with regard to liability – the rule also presumes causation of the resulting accident. The rule of *The Pennsylvania* imposed presumptive, strict liability on the stationary object unless it can be proved that the statutory violation "could not have contributed" to the accident. *In Re Wasson*, 495 F.2d 571, 580 (7th Cir. 1980).

In the case of railroad bridges, the hazard which compels certification for federal funding under the Truman-Hobbs Act is essentially the same hazard – a narrow channel which dates back to early years of railroad construction which no longer fully meets the growing needs of navigation.[2] Applying common sense, any allision at a bridge can be attributed, at least in part, to the relative narrowness of the navigational channel under the bridge. Thus, applying the rule of *The Pennsylvania* would entirely reverse the presumption of liability established by the rule of *The Oregon* for approximately half of all allisions throughout the navigable waterways of this nation. Under the rule of *The Pennsylvania*, the stationary object, not the mobile marine vessel, would hereinafter be presumed to be liable and be forced to pay for all consequential losses due to allisions.

In addition to the threat of strict liability resulting from the rule of *The Pennsylvania*, the owners of qualified bridges have lost any hope of reliance upon the rule of *The Oregon* in future allision disputes. The rule of *The Oregon* is not an anachronism; it is a necessary and important part of the regulation of river traffic. The rule operates much like the principle of *res ipsa loquitur* in that it is

---

[2] Marine vessels have become more powerful, pushing more barges with larger capacity thereby making navigation through bridges more difficult than with fewer smaller barges.

a common sense standard that attributes responsibility to the party who exclusively controlled the instrument of harm. The rule recognizes that a stationary and charted object located in a navigable waterway on any given day has no alternative but to be what it is – a stationary object occupying one well-known location. By contrast, the river pilot controls the number of barges being shoved, the size of the tugboat, the tonnage of the loads, the speed of approach, the horsepower of the engine, the use of a helper tug, the decision to reverse and go upstream, and so on. The rule of *The Oregon* puts teeth in the general principle that river pilots are absolutely required to know the currents and the effect of wind on their tows, and they are absolutely expected to traverse the known difficulties of the river without causing harm. *The Louisiana*, 70 U.S. 164, 173, 3 Wall. 164 (1865) and *Illinois Constructors Corp. v. Logan Transportation*, 715 F. Supp. 872, 888 (N.D. Ill. 1996). Anything less than this time-honored expectation of precise navigation will tend to erode the skill of marine pilots and inevitably result in an increase in accident frequency and severity.

From a pragmatic standpoint, the rule of *The Oregon* has been the saving grace for stationary objects. In many cases, the owner of the stationary object has no witnesses to the accident; indeed, even if a bridge tender is present, he or she rarely has any knowledge as to the reason for the allision. Moreover, river pilots and captains comprise a notoriously phalanxed joint interest group, and therefore as a rule, no pilot will provide testimony of fault against another pilot especially in favor of a railroad. In short, when a stationary object is hit, all the witness testimony, all the expert testimony, and the litigation advantages attendant thereto fall squarely in the camp of

the marine lines, which controlled everything and everyone in the vicinity of the nautical approach. The rule of *The Oregon* levels the playing field by application of a legal presumption that is solidly based upon plain common sense.

As a result of the rule of *The Oregon*, barge lines limit the number of barges in each tow during high water periods and train pilots meticulously to navigate through a bridge's draw safely. In the wake of this decision, a barge line whose pilot negligently strikes a Truman-Hobbs Act bridge will consider itself responsible for *none* of the damage caused to the bridge and its protections. A Truman-Hobbs Act qualified bridge might be out of service for weeks or more and the railroad owner will be unable to seek any settlement from the responsible barge line. On the contrary, the barge line will foreseeably assert a right to collect 100% of the damage to its barges and cargo, relying on the rule of *The Pennsylvania*. All of this will be based on the completely illogical legal assumption that a passive, stationary bridge can be "at fault" and can cause an allision, even though the bridge itself was properly built, charted and duly permitted by the U.S. Coast Guard. Thus, responsibility for safety will shift out of the hands of those persons on the river who have the ability to effectuate compliance with safe navigational practices and will shift into the hands of persons who have no control over navigational safety.

Considering the overall number of allisions involving these particular railroad bridges, the economic and safety consequences become apparent. Assuming that the next ten years will mirror the safety record of the last ten years, there will be the potential for over two thousand "new" federal lawsuits filed on behalf of marine lines

against bridge owners, claiming damages for allisions at the qualified bridges. Instead of the economic burden of these allisions being borne by the marine mode of transportation, which controls the vessels which strike the bridges, these suits will argue that the burden is transferred to the railroad mode of transportation because the bridges are "unreasonable hazards to navigation." With no control over the necessary federal funding and no ability to act without the direction of the Coast Guard, the railroads will not be able to take any actions whatsoever to improve marine safety or to avoid future allisions. Moreover, mariners will have no incentive to undertake the careful training, the heightened care, and the extreme precautions that are appropriate in the vicinity of these older structures. It is therefore highly likely that there may be many *more* than the historical quantity of 2,000 plus hits at the qualified bridges in the next decade. The consequential interruption of rail service, economic impacts on small and medium railroad operators, and wholesale injustice on the navigable waterways of this country would create a chaotic nautical environment, especially on the upper Mississippi River, that only review by this Court can prevent.

II.

Because Safety on the Waterways is Controlled Under Section 401 (Permitting), the Unprecedented Construction of Section 512 as a Safety Statute Disrupts the Coast Guard's Regulation of Safety on the Waterways

The current dispute requires the reconciliation of two sections of Chapter 33 of the United States Code, both of which are administered by the U.S. Coast Guard. The first

is Section 401, which requires the consent of Congress and approval by the Secretary of Transportation for all plans prior to the construction or modification of any bridge over a navigable waterway. Pursuant to this statute, the Coast Guard studies proposed and existing bridges over the nation's navigable waters and issues permits for approved structures which prescribe its exact location, its permitted dimensions, and other safety and precautionary characteristics. 33 C.F.R. §§114.01 *et seq.* Specifically, "[t]he decision as to whether a bridge permit . . . will be issued . . . must rest primarily upon the effect of the proposed action on navigation to assure that the action provides the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment." 33 C.F.R. §114.10.

The second section of Chapter 33 which must be reconciled with Section 401 is Section 512 of the Truman-Hobbs Act. This statute was passed 41 years after the permitting statute and was described by Congress as a measure intended to provide reasonable funding for railroad bridge renovations. (*See* Argument III, below.) Prior to any bridge being considered for funding under this statute, it must be a "lawful bridge" as set forth in 33 U.S.C. §511. The statute also requires the Coast Guard to hold public hearings in connection with any bridge that, in the opinion of the Secretary, at any time unreasonably obstructs navigation. 33 U.S.C. §513. The public hearing serves the purpose of providing a full opportunity for the bridge owner and any other interested parties to "be heard as to whether any alteration of such bridge is needed, and if so, what alterations are needed, having due regard to the necessities of the rail . . . traffic." *Id.* This hearing has historically been non-adversarial

because the bridge owner is at worst indifferent to reconstruction, and in most cases realizes some benefit from the assistance of federal funding. After the public hearing, if the Coast Guard "determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, . . . [it] shall so find and shall issue" an order requiring such alterations. 33 U.S.C. §513. This decision will be accompanied by a report, required under the Truman-Hobbs Act, with supporting written analysis, including a cost benefit ratio. 33 C.F.R. §116.3.

The Sabula Bridge had reached this point in the administrative process at the time of the collision, and it remains at this point today. There are 13 qualified bridges that are awaiting reconstruction, none of this reconstruction has been fully funded. The next step in the process is that the Coast Guard itself initiates renovation activity when funding becomes feasible. 33 C.F.R. §116.40. In correspondence from the Coast Guard, dated May 2, 2000, the Truman-Hobbs process was explained as follows:

> Enclosed is the current list of Truman-Hobbs Bridges, which have received the Coast Guard's Order to Alter. From that list, the Coast Guard initiates alterations (design or construction) depending upon availability of funding appropriated by Congress for a specific bridge during each fiscal year.

Many years may elapse before funding is successfully appropriated and the bridge is redesigned, respecified, repermitted and finally rebuilt. Of the structures which are now subject to an "Order to Alter" from the Coast Guard, most have been subject to that order for at least five years. *See, e.g., In re Great Lakes Towing v.*

Motorship Boku Maru, 384 F. Supp. 549 (N.D. Ill. 1972), *aff'd sub nom.*, 505 F.2d 579 (7th Cir. 1974) (14 years).

The Seventh Circuit in this case construed both Section 512 and Section 401 as navigational statutes, concluding that Coast Guard findings submitted under Section 512 serve to negate legal presumptions that arise from a valid permit. Even though the Sabula Bridge was then, and is now, a structure sanctioned by the Coast Guard under Section 401, the Seventh Circuit ruled that the same agency's findings under Section 512 defeated the rule of *The Oregon*. As discussed in Argument I. above, this ruling potentially leads to a reversal of the governing presumptions whenever a qualified bridge is involved in an allision.

For the last 59 years, there has been absolute clarity under the rule of *The Oregon* that a permitted and charted structure was a legal and approved object, even though all such structures obviously constitute an obstruction to navigation. For example, a structure that conformed to its permit could not be characterized as a "negligent" structure under admiralty law. *Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1049-50 (7th Cir. 1995). The decision below has now reversed this body of law. Thus, even though Truman-Hobbs Act bridges conform to their permits, they cannot claim the benefit of any presumption and will be attacked as being an "unreasonable obstruction" for purposes of civil litigation. It will be extremely difficult for any bridge owner to win an allision case under those circumstances regardless of the navigational facts.

The lower court's construction of these two statutes will lead to intense administrative confusion and to

haphazard assessments of liability for future allisions. First, the Coast Guard's administrative proceedings under the Truman-Hobbs Act will become adversarial for the first time in history. Owners will vigorously oppose initiation of the process and will contest the Coast Guard's procedure because they will not want their bridge to be labeled by the Coast Guard as an "unreasonable obstruction to navigation" because of the maritime litigation consequences. Second, the Coast Guard will be forced to contradict itself. The agency will be issuing legal permits for bridge structures that it has legally pronounced to be "unreasonable obstructions to navigation." Juries and judges will weigh these self-contradictory agency pronouncements and will reach inconsistent interpretations of their relative meaning and legal consequences in civil cases.

The confusion will extend to the agency's day-to-day regulation of navigation on the waterways. A significant portion of the Coast Guard's duties involve the investigation of each nautical accident and the imposition of fines and sanctions for violations of safe navigational practices. Hundreds of these investigations will occur at qualified bridges in the next few years. In this regard, the Coast Guard has historically and unbendingly taken the position that a skilled mariner should be able to avoid an allision with a stationary object which has been properly permitted and clearly located on a Coast Guard map. This is consistent with the legal principle that pilots are required to know the effect of winds and currents on their vessels. *Illinois Construction Corp. v. Logan Transportation*, 715 F. Supp. at 881. In order to gain relief from his or her responsibility to maintain control of the moving vessel, the pilot must demonstrate intervening weather

conditions involving hurricane force winds and must show that these conditions could not have been foreseen or anticipated by the navigator. *Boudoin v. J. R. McDermott & Co.*, 281 F.2d 81, 87 (5th Cir. 1960) and *Patapsco Scrap Corp. v. Maryland Shipbuilding & Drydock, Co.*, 268 F.2d 817, 818 (4th Cir. 1959).

The wholesale transposition of allision responsibility from moving vessels to stationary objects will disrupt the Coast Guard's regulatory scheme. At all further investigations, pilots and captains will contest and appeal Coast Guard findings of pilot error on the grounds that the bridge was an "unreasonable" obstruction. Therefore, the marine lines will argue that the pilot was acting "reasonably."

Courts have recognized that in many arenas safety compliance is enforced by economic motivations. For example, the doctrine of products liability was judicially formulated because of the recognition by legal scholars of the essential connection between foreseeable cost and safety enforcement. In the groundbreaking legal opinions which created the theory of products liability, the courts noted that the makers of products profited from their sale, and that the motivation to manufacture safer products could only be created by transferring the cost of injuries to the product manufacturers. *Cappellini v. McCabe Powers Body Co.*, 713 F.2d 1, 7 (2nd Cir. 1983) and *Greenman v. Yuba Power Products*, 377 P.2d 897, 901 (Ca. 1963). In the current matter, this logical approach has been turned directly on its head. The overall effect of the lower court's ruling is to transfer some and perhaps all economic responsibility for allisions away from pilots and barge lines, who navigate the rivers and the waterways of this country. Thus, responsibility is shifted away

from those who can take active steps to avoid future allisions and transferred instead to bridge owners, who face assessments not only for the cost of repairing their own bridges, but also may be forced to reimburse marine traffic for vessel damage, lost cargo, down time, and other marine transportation expenses. The obvious problem with this interpretation of the statutory scheme is that it delegates the duty to enforce navigational safety rules to persons who have absolutely no ability to influence navigational safety in any way. Bridge owners cannot control any vessels on the river; they cannot train pilots in safe approaches; they cannot instruct captains to use a helper tug, or to employ safer techniques. In short, the bridge owner cannot affect navigational safety.

The case at bar is a typical example of the need to impose the navigational safety obligations firmly on the mariners. On May 5, 1996, the bridge at Sabula was opened as soon as the M/V Megan Beesecker backed into the river approximately one and one-half miles above the bridge. The pilot of the M/V Megan Beesecker decided that, despite gusty winds that day, he would proceed downstream without a helper tug. Moreover, he *added* three barges to his tow immediately above the bridge. When gusty winds began to blow his tow off course, he continued his approach to the bridge rather than back upstream in order to realign the tow.

The bridge owner had no influence over any of these crucial decisions. The bridge remained passive, stationary, and unchanging throughout the 40-minute approach to the bridge. Under the principles enunciated by the court of appeals below, the federally qualified bridge can no longer rely on the presumptions established by *The Oregon* rule. Under the lower court's ruling, the passive

bridge will apparently be labeled as "unreasonable" to the trier of fact, and the barge owner will argue that the bridge is presumptively at fault for the entire collision.

The Coast Guard's regulations seek to enforce safety primarily by controlling the conduct of mariners. The Coast Guard has been understandably adverse to placing responsibility for navigational safety on the owners of unthinking, accurately charted stationary objects that comply with valid permits. The lower court's construction of the relevant statutes puts Section 512 in direct conflict with Section 401 and contradicts the agency's overall scheme governing the regulation of safety on American waterways.

III.

The Court of Appeals' Decision Defeats the Legislative Purposes of the Truman-Hobbs Bridge Act of 1940 and Disrupts the Balance Established Between Two Competing Modes of Transportation

The purposes of the Truman-Hobbs Act are clearly enunciated in its colorful legislative history. As noted by Congress, the purpose of the legislation was (i) to protect railroad bridge owners from paying for alterations to their bridges that will benefit marine lines but not rail transportation; and (ii) to protect bridges from abandonment in order to maintain rail service to all possible communities and to promote the national defense. 86 Cong. Rec. 8647 (1940).

Congress was especially concerned that the railroads should not be compelled to pay for capital improvements

which served to benefit their own competitors. Congressmen noted that ships carrying cargo on the river are in direct competition with the railroads who own the bridges.

> The navigable stream is publicly owned; the highway is publicly owned, including its bridges. The railroad is privately owned, but acquires its right to construct the bridge because it serves public transportation. The commercial carrier, whether on the highway or on the river or on the rails, is not publicly owned, but is a privately owned carrier. Transportation, whether on water, highway, or rails is paid for by the shipping public. The public owns the highway, but it does not own the commercial vehicles that haul the freight. The public owns the river, but it does not own the private ship that carries its freight for hire.
>
> A railroad company desires to build a line to transport freight for the public. It gets a permit from the War Department and constructs its bridge to conform to the specifications required by the Secretary of War. The Secretary makes those specifications to meet the needs of vessels using the watercourse. In subsequent years a steamship company comes along and wants to widen the channel or raise the clearance of the bridge, or change its location. The steamship company wants to do that to aid its transportation business, probably as a competitor of the railroad owner of the bridge. The railroad company, by the agent of the Government, is ordered to make whatever alteration is required at an expense of $1,000 or $100,000, without any contribution from anybody benefited by the alteration. 86 Cong. Rec. 8647 (1940).

Each time the marine industry builds a bigger ship to carry more cargo, the federal government has the right to require railroads to alter their bridges to accommodate the increased size of shipping. In the absence of the Truman-Hobbs Act, the railroads would have to pay for the enormous cost of bridge reconstruction at their own expense.

In order to protect the financial security of the railroads, Congress ordered that reconstruction costs would be apportioned. Contrary to the suggestion of the court of appeals below, there was no compromise effected whereby the financial support for renovation was balanced by increased liabilities under admiralty law.[3] Nowhere in the legislative record did any member of Congress mention that, with the same legislation, railroads would be subject to additional civil liability under the admiralty laws. The Congressmen went to great lengths to note that it was their intent to *reduce* bridge owner's costs as a result of the "Orders to Alter," not to increase them. The concept that passive bridge owners could someday be liable for allisions, while continuing to be in full compliance with an existing permit, would be

---

[3] The Seventh Circuit suggested that the Act was a legislative compromise that exchanged reconstruction funding in return for changes in the law of admiralty stating: "Perhaps the Truman-Hobbs Act as a whole was a concession to bridge owners, a victory for an interest group, but like most statutory packages, it is a complex deal, with some features making life easier for the proponents and other features attaching prices. Here a subsidy comes hand in hand with a finding that the bridge is an unreasonable obstruction to navigation. Such a finding has many consequences; one may be an effect on negligence litigation under admiralty jurisdiction." (App. 5)

inconceivable to the bills' many sponsors and contradicts the central purpose of the Truman-Hobbs Act.

This Court has held that common law rules of liability should not be supplemented by a statute in the absence of specific and clear language in the statute setting forth that intent. *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35, 104 S.Ct. 304 (1983). In *Norfolk Redev. & Hous. Auth.*, this Court held: "It is a well-established principle of statutory construction that the common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." Since admiralty law is based upon common-law developed over centuries of decisions, this canon of construction specifically applies to the issue in the case at bar. This principle was reaffirmed by this Court in *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631 (1993). This Court stated in that case, "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." Since the Truman-Hobbs Act made no reference to civil liability of bridges due to allisions, the common law of admiralty cannot be replaced by the Seventh Circuit's interpretation of the Truman-Hobbs Act.

The reversal of the rule of *The Oregon* and the potential for wholesale imposition of civil liability on railroads swings the balance of equities dramatically against the railroads and in favor of marine lines. Whereas, the rule at the time of the enactment of the Truman-Hobbs Act (and for 59 years thereafter) was that the railroad bridge owners did not pay for the extensive costs of allisions, the decision below reverses that time-honored precept. The cost of this reversal is significant.

When the Truman-Hobbs legislation was being debated, the prospect of bridge abandonments was specifically discussed as a genuine threat to the national defense. For example, Mr. Hobbs explained to his fellow Congressmen that a bridge owner, due to financial constraints, may prefer to abandon a bridge before undertaking the cost of construction of ordered alterations. The first and foremost reasons given by Mr. Hobbs to support this bill was as follows:

> "First. National defense cannot be made adequate without adequate rail and waterways. The United States is a land of vast distances. No one can predict where there may be a need to concentrate men, munitions and war material. . . . No matter how many tanks and guns, no matter how much ammunition we may manufacture, we must be prepared to haul them where we want them when we want them. A railroad is no better than its bridges. A waterway no better than its clearances." 86 Cong. Rec. 8653 (1940).

This concern with respect to bridge abandonments compels a reversal of the court of appeals ruling below. The liability imposed by the Seventh Circuit potentially exceeds any costs of renovation, and may impel smaller railroads to abandon bridges rather than renovate them.

In addition to the effect on national defense, small spur lines are often the only source of rail service to small communities and rural areas. The looming liability arising from an "Order to Alter" may render rail service to those communities economically infeasible and lead to the abandonment of the line. This will have drastic consequences for those families and industry that rely upon rail transit in these areas. Small railroads, like the I&M,

may be seriously affected by a single big allision or by repeated bridge hits during fast waters or flood conditions. In short, shifting the cost of allisions from marine lines to bridge owners not only is illogical, but also it is economically irrational and will have a destructive impact on the nation's transportation systems.

IV.

The Appellate Court's Decision Creates A Conflict Among the Circuit Courts of Appeals

The Seventh Circuit opinion is in direct conflict with the longstanding authoritative decision of *Seaboard Airline Co. v. Pan American Petroleum & Transport Co.*, 199 F.2d 761 (5th Cir. 1952), *cert. denied*, 345 U.S. 909 (1953), which that holds that an order to alter, issued under the Truman-Hobbs Act, is insufficient to rebut the presumption of *The Oregon* Rule when assessing liability between a moving vessel and a stationary bridge that is in full compliance with a valid permit.[4]

Seaboard Airline R. Co. involved a factual scenario almost identical to the case at hand. Each case involved a properly permitted railroad bridge that was involved in an allision while under a Truman-Hobbs Act order to alter, requiring the width of the navigational channel to be increased.[5] In addition, in neither situation had the

---

[4] Decisions of the Fifth Circuit, dated prior to September 30, 1981, are binding on the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[5] Although the Seventh Circuits opinion states that *Seaboard Airline R. Co.* does not mention the "Truman-Hobbs

alterations ordered been initiated prior to the subject allisions. In both cases, the marine vessel attempted to rebut the presumption of the Rule of *The Oregon* based upon the mere existence of the order to alter, which designated the bridge as an "unreasonable obstruction to navigation." In contrast to the Seventh Circuit, the Fifth Circuit ruled as follows:

> When, as the record shows to be the case here, the conditions claimed to be unlawful or negligent are entirely passive and have existed for many years to the knowledge of the moving vessel; when too, the evidence is, as here, uncontradicted that, while these conditions do tend to make the passage more difficult than if they did not exist, a passage can be safely made under the conditions if due care is exercised; there is no basis in the record even for a division of damages in favor of the actively negligent moving vessel, much less for awarding it full damage. *Id.* at 765.

The *Seaboard Air Line R. Co.* court went on to add:

> The undisputed facts as to these matters, however, do not support the finding in law that at the time of the collision the bridge was an unlawful structure, or that its existence was in and of itself negligent so as to authorize recovery in favor of those who bungled and blundered their way into collision with it." *Id.* at 765.

Act," the lower court decision clearly states that the order to alter was issued pursuant to 33 U.S.C. §§511, et seq. (App. 14) *Seaboard Air Line R. Co. v. the Pan Maryland*, 105 F. Supp. 958, 961 (1952).

The U.S. Coast Guard report, relied upon by the Seventh Circuit to rebut *The Oregon* Rule, did not indicate that Sabula bridge was unsafe, only that "significant reductions in speed are required to safely transit the bridge" or, as cited in the Seventh Circuit's decision, passage required "precise navigation." (App. 6) Unlike the centuries of admiralty law to the contrary, the Seventh Circuit found that "precise navigation" and "reductions in speed" are too great a burden to place upon marine traffic. Instead, the decision would open the bridge owner up to potential liability regardless of full compliance with Coast Guard permits.[6]

As a result of this conflict among the circuits, the rules of admiralty will differ depending on where an allision occurs. In fact, different admiralty presumptions will apply to mariners on different parts of the Mississippi River, depending on whether they are in the upper or lower portion. (The lower Mississippi River runs along the border of Fifth Circuit states of Louisiana and Mississippi, while the upper Mississippi, at issue in this case, runs along the border of the Seventh Circuit state of Illinois.) Due to the conflict among the circuits, neither bridge owners nor mariners can accurately predict the

---

[6] This Court's opinion is also in conflict with *Texas & P. Railway Co. v. Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927), *cert. denied*, 275 U.S. 534 (1927) which found as a matter of law that a bridge built pursuant to the authority of Congress, according to plans and specifications approved by the Secretary of War, afforded the bridge owner complete protection from allegations that the bridge was improperly constructed. *Id.* at 19. Like the case at hand, *Texas & P. Railway Co.* also involved a bridge that was involved in an allision after an order to alter was issued by an administrative body with congressional authority.

law to be applied in the event of an allision at a bridge under a Truman-Hobbs order to alter.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street N.W.
Washington, D.C. 20006
(202) 736-8000

WESTON W. MARSH*
MICHAEL J. SCOTTI, III
FREEBORN & PETERS
311 South Wacker Drive
Suite 3000
Chicago, IL 60606-6677
(312) 360-6000

Counsel for Petitioner

* *Counsel of Record*

APPENDIX A

I&M RAIL LINK, LLC, Plaintiff-Appellee,

v.

NORTHSTAR NAVIGATION, INC., Defendant-Appellant.

No. 99-2128.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 10, 1999.

Decided Jan. 5, 2000.

Weston W. Marsh (argued), Freeborn & Peters, Chicago, IL, for Plaintiff-Appellee.

James K. Mondl (argued), Tonkin & Mondl, St. Louis, MO, for Defendant-Appellant.

Before EASTERBROOK, ROVNER, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

The railroad bridge across the upper Mississippi River near Sabula, Iowa, is more than a century old. (The bridge is just south of Savanna, Illinois, where Route 52 crosses the river.) Authorized by the Secretary of War in 1880, built in 1881, and substantially renovated between 1905 and 1908, the bridge has a deck too low for river traffic to pass. Transit is through a pin-connected swingspan, which, when river traffic approaches, rotates 90° on the pivot to produce two channels, each 154 feet wide. The river's shipping channel is 300 feet, so the bridge effects a substantial constriction. To pass the bridge a towboat and its fleet of barges must line up perfectly, even when wind and currents combine to push the assembly off the centerline.

On May 5, 1997, the M/V MEGAN BEESECKER was moving downriver with a tow of 12 barges, arranged 3 across and 4 deep. The tow was 105 feet wide, and the assembly (including the towboat) was 780 feet long and weighed about 21,000 tons. This is a common size; 15-barge fleets (lashed 3x5) also are frequent. Pilot James Jarvis planned to use the western (or Iowa) channel, but a wind from the northwest pushed the tow off its centerline. Jarvis then tried to maneuver the tow through the eastern (or Illinois) channel but entered at an angle, and the barges hit the bridge. Admiralty calls this an allision (distinguished from a collision, in which moving vessels meet). I&M Rail Link, the bridge's owner, filed this admiralty action demanding compensation for the damage to the bridge; Northstar Navigation, which operates the MEGAN BEESECKER, filed a counterclaim seeking compensation for the damage to the barges and towboat. The district court granted summary judgment against Northstar, applying the principle of *The Oregon*, 158 U.S. 186, 192-93, 15 S.Ct. 804, 39 L.Ed. 943 (1895), and *The Louisiana*, 70 U.S. (3 Wall.) 164, 173, 18 L.Ed. 85 (1865), that a vessel is presumptively at fault when it hits a stationary object. Northstar sought to rebut this presumption by arguing that the Sabula Bridge is an unreasonable obstruction to navigation. *See The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873). The permit, issued in 1880 under what is now 33 U.S.C. § 401, was amended as recently as April 1996, so the Sabula Bridge cannot be condemned out of hand. But 33 U.S.C. § 512, which provides that "[n]o bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States", applies to all bridges, not just those

built without permits. The Coast Guard, which today administers both § 401 and § 512, *see* 49 C.F.R. § 1.46(c)(3), (5), has found that the Sabula Bridge unreasonably obstructs navigation because its channels are too narrow. A report issued late in 1995 sums up:

> The horizontal opening of 154 feet does not provide adequate clearance for contemporary commercial tows. This leaves about 24 feet of clearance on each side of the tow when transiting the bridge. This requires commercial tows to be perfectly aligned with the opening when approaching and transiting the bridge to avoid contacting the bridge. This is not what the navigational characteristics of the waterway dictate. If the bridge provided adequate horizontal clearance, tows transiting this reach of the river would assume the angular characteristics required of a turn. A standard tow would occupy a width of at least 172 feet in order to steer the turn through the railroad bridge.

The permit requires the owner to renovate or even remove the Sabula Bridge if necessary to permit unhindered movement on the river. On June 17, 1996, the Commandant of the Coast Guard took action based on the 1995 report. The Commandant "determined that the [Sabula Bridge] is an unreasonable obstruction to navigation" and directed its owner to reconstruct the bridge so that

> The movable span shall provide a horizontal clearance of no less than 300 feet measured normal to the channel and a vertical clearance of no less than 52 feet above the two percent flowline or 60 feet above normal pool, whichever is greater, in the open position and 6 feet above

> the two percent flowline or 18 feet above normal pool in the closed position. These clearances are necessary for the reasonable needs of navigation.

This order was issued more than ten months before the MEGAN BEESECKER and her tow struck the Sabula Bridge. Yet to this day I&M Rail Link has neither sought judicial review of the Commandant's order nor taken the first step to comply with it (which, according to 33 U.S.C. § 514, is the preparation and submission of a plan to alter the bridge).

In the district court, I&M Rail Link argued that the Coast Guard's finding that the Sabula Bridge is an unreasonable obstruction to navigation should be ignored, because § 512 is part of the Truman-Hobbs Bridge Act of 1940, 33 U.S.C. §§ 511-23. An order issued under this Act leads to a cost-sharing proceeding, and the United States has promised to bear part of the reconstruction expense "attributable to the necessities of navigation." 33 U.S.C. § 516. The district court agreed with I&M Rail Link's position that the only significance of the Commandant's order (and the findings on which it was based) is to facilitate a draw on the Treasury. On this interlocutory appeal under 28 U.S.C. § 1292(a)(3) from the grant of summary judgment to I&M Rail Link, the principal question is whether the district court's understanding of the Coast Guard's report and decision is correct.

All bridges with piers in the water or decks lower than the tallest ship obstruct navigation. Usually the degree of obstruction is reasonable in relation to the commercial benefits of the bridge. Sometimes, however, changes in the nature of water-borne commerce or the

conditions of the waterway render unreasonable an obstruction that was justified when built. Congress promised that, when such a change occurs, the United States will bear part of the renovation expense. But that is not all the Act does. Section 512 forbids maintenance of a bridge that has become an unreasonable obstruction, and § 519 imposes civil and criminal penalties on bridge owners that fail to comply with a renovation order. What is more – and what is more important – the Act supplies funding only if a bridge has become an unreasonable obstruction to navigation. I&M Rail Link treats the unreasonable-obstruction finding as a matter of form, a kind of administrative wink and nudge needed to liberate public funds. But we have no reason to think that Congress contemplated fraudulent findings; both the structure of the Act and the evident seriousness with which the Coast Guard takes its task show that public funds are available only if the bridge really is an unreasonable obstruction to navigation.

Perhaps the Truman-Hobbs Act as a whole was a concession to bridge owners, a victory for an interest group, but like most statutory packages it is a complex deal, with some features making life easier for the proponents and other features attaching prices. See Jerry L. Mashaw, Greed, Chaos, & Governance: Using Public Choice to Improve Public Law 81-105 (1997); Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 88-115 (1991). Here a subsidy comes hand in hand with a finding that the bridge is an unreasonable obstruction to navigation. Such a finding has many consequences; one may be an effect on negligence litigation under the admiralty jurisdiction.

If the Coast Guard's finding were an unelaborated ukase, it would do Northstar little good in rebutting The Oregon's presumption. But the Coast Guard gave several reasons, and these reasons have independent significance for the suit. One is that, when the bridge was built, vessels moving on the river were smaller. A 154-foot channel was ample. Today, with wider, longer, and heavier vessels, the channel is too narrow. With a smaller vessel, the 154-foot span is adequate even if the pilot makes an error; today only precise navigation allows a transit without incident. The Coast Guard's report observes that towboats must maneuver near the bridge until wind and current, coupled with the vessel's momentum, permit a transit. That takes time, which increases the expense of navigation. Sometimes the towboat just can't do the job alone; power must be applied at both ends of the tow to keep the assembly straight. The Coast Guard added that "approximately 90% of the river pilots use helperboats at this bridge on some occasions." Helperboats, which are small tugboats, are costly and add to the delay in passing the bridge.

The Sabula Bridge is struck repeatedly. For the 11-year period 1980 through 1990, the bridge was hit at least 63 times. (Some allisions are not reported, so the Coast Guard views this as a conservative estimate.) There were 27,663 recorded commercial tows during this period, so at least 1 in every 439 transits produced an allision. I&M Rail Link says that this shows that the bridge is safe; with careful navigation a pilot can transit without incident. But the Coast Guard drew a different inference: it concluded that a bridge should have a much lower accident rate. What would one think of a highway bridge struck

by one out of every 500 passing cars? Or an airport designed so that one of every 500 landings produced an accident? What if one of every 439 trains passing over the Sabula Bridge derailed? An accident rate of 1 in 439 is too high for river transportation, the Coast Guard concluded. Doubtless some of these allisions could have been avoided by prudent navigation, but others must be chalked up to the fact that the bridge was designed for navigation in a different era.

Perhaps there would be less reason for concern if the Sabula Bridge were the only tight squeeze, and all other bridges had 300-foot spans to match the main navigation channel. But they don't. The degree of obstruction to navigation depends on the risks and costs of navigating the river from origin to destination. A series of bridges with a design similar to the Sabula Bridge may well pose costs substantially greater than the expense of renovation, and thus represent unreasonable obstructions to navigation in the sense that the value of precautions exceeds their discounted costs. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir.1947); cf. *Reardon v. Peoria & Pekin Union Ry.*, 26 F.3d 52 (7th Cir.1994). The Sabula Bridge is the third-most-frequently struck on the Mississippi: it was hit at least 204 times from 1972 through 1996; the two "leaders" were hit 481 and 350 times during this period, and three other bridges were struck at least 100 times during these years. Other bridges are hit rarely if ever. It is unlikely that all of these allisions can be attributed solely to pilots' negligence. Calling the most-frequently-struck bridges unreasonable hazards to navigation makes a good deal of sense.

If the Coast Guard may find the Sabula Bridge an unreasonable obstruction based on the cost and accident data, then so may the trier of fact in admiralty, where Learned Hand's famous *Carroll Towing* formula for negligence originated. Findings in the Coast Guard's report are more than adequate to overcome The Oregon's presumption. *See Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1050-51 (7th Cir.1995). Perhaps Jarvis should have reversed the MEGAN BEESECKER's engines rather than attempting to use the Illinois channel; perhaps he blundered earlier when using the current to line up for the transit; but perhaps this was one of the allisions that are to be expected given the clash between an 1880 design and the nature of modern traffic on the Mississippi. See Charles Parrow, Normal Accidents: Living with High-Risk Technologies (rev. ed. 1999). The trier of fact must give an answer without resort to presumptions. Although the Coast Guard's findings may well be conclusive for some purposes under *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435 (1910), the question remains whether the shortcomings of the bridge caused this accident. Because admiralty uses a comparative-fault regime, the possibility that Jarvis and the bridge's design each bear some responsibility cannot be overlooked. The judgment is reversed, and the case is remanded for trial.

APPENDIX B

United States District Court,
Northern District of Illinois

98 C 50359

I & M Rail Link vs. Northstar

Name of Assigned Judge
Philip G. Reinhard

DATE 4/21/1999

ORDER

Plaintiff, I&M Rail Link, filed a complaint against Northstar Navigation, Inc., in personam, and the M/V Megan Beesecker, in rem, for damages incurred by plaintiff's Sabula bridge on May 5, 1997. The complaint was originally filed in the Eastern Division of the Northern District of Illinois, but was transferred to this division for proper venue by Judge Norgle. In the same order, Judge Norgle denied defendant's motion contesting personal jurisdiction. This court has jurisdiction over this admiralty claim pursuant to 28 U.S.C. § 1333, Fed. R. Civ. P. 9(h) and 46 U.S.C. § 470.

Briefly, the facts are that the Sabula bridge is a span bridge with two passages around the center span, the Iowa and the Illinois draw. Generally, downstream traffic used the Iowa draw. On May 5, 1997, the M/V Megan Beesecker, a tug, was on its way down stream with a load of 12 barges. A half mile from the bridge, the pilot became aware of the strong wind conditions and thereafter, he realized he was out of position to go through the Iowa draw. (Jarvis dep. p. 73). The pilot attempted to correct, but became more out of alignment and had to

attempt the Illinois draw. The front left barge contacted the bridge, and an accident occurred. Some of the barges and the M/V Megan were not removed from the draw until sometime the next day. Plaintiff, the owner of the bridge, brought this action against the owner of the boat and the boat, and is seeking a warrant of seizure for the boat pending this action. Plaintiff also seeks summary judgment as to its complaint. Defendants have filed a counter-complaint for the damage to the boat.

The Seventh Circuit applies the Oregon rule, which holds that there is a presumption of fault against a moving vessel when it strikes a stationary object, such as a bridge. *See Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1051 (7th Cir. 1995). That presumption can be rebutted by presenting evidence that the allision was the fault of the stationary object, the moving ship acted with reasonable care, or that the allision was an unavoidable accident. *Id.* In this case, there is no evidence that the bridge operator was negligent. The facts indicate the bridge, specifically the Illinois draw, is in compliance with its existing permits in that it exceeds the 154 feet requirement of the permit issued in 1943. Instead, defendant's argument in that respect is that the bridge was an unreasonable obstruction of navigation, in violation of 33 U.S.C. § 512, therefore invoking the presumption created by Pennsylvania rule, that a violation of a statute intended to prevent collisions shifts the burden to the violating party of proving that the violation could not have been a cause of the collision. *See id.* at 1046-47.

The Pennsylvania Rule is not applicable to this situation. All bridges are an obstruction to navigation, but are necessary for commerce. The fact that an administrative

agency has declared the bridge an unreasonable obstruction to navigation for purposes of qualifying for federal funds does not mean the bridge is per se in violation of a navigation statute. The opinions of the pilot, president of defendant Northstar and a marine surveyor that the bridge is an unreasonable obstruction and the accident would not have occurred if the opening was 300 feet is not relevant to the question of the bridge's negligence. Plaintiff admits that the bridge is difficult to navigate and it would obviously be easier to navigate if the opening was twice as wide. The bridge has been in existence since 1880 and did not engage in any active behavior that could be said to be a negligent cause of the allision. Cf. *id.* at 1055 (drawbridge not opened to the maximum angle specified in permit was sole and proximate cause of allision between moving vessel and bridge). Defendants' argument that the protective structures were dilapidated is a damages issue.

Defendants have also failed to rebut the presumption of negligence with evidence that the ship acted with reasonable care. The pilot M/V Megan Beesecker was aware of the conditions of the bridge and had in fact successfully navigated in a number of times in the past. The captain of a ship is charged with knowing all navigational conditions reasonable ascertainable by experienced mariners navigation the waterway. *Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F. Supp. 872, 881 (N.D. Ill. 1989). The pilot testified he was familiar with the currents and was aware of the wind factor when he was still capable of stopping and reversing direction. (Jarvis dep. pp. 78, 80-81).

Finally, there is no evidence the weather conditions were such that the allision was unavoidable, i.e., a hurricane or other catastrophic condition.

Plaintiff prevails because it has met its burden of a prima facie case of negligence through the presumption created by the Oregon Rule and defendants have not met their burden of rebutting that presumption of negligence and are therefore liable for the allision. Plaintiff is granted summary judgment.

The motion for a warrant of seizure is denied without prejudice as defendants have represented there is adequate security.

APPENDIX C

I&M RAIL LINK, LLC,
Plaintiff-Appellee,

v.

NORTHSTAR NAVIGATION, INC.,
Defendant-Appellant.

No. 99-2128.

United States Court of Appeals,
Seventh Circuit.

Feb. 25, 2000.

Weston W. Marsh, Freeborn & Peters, Chicago, IL, for Plaintiff-Appellee.

James K. Mondl, Tonkin & Mondl, St. Louis, MO, for Defendant-Appellant.

Before EASTERBROOK, ROVNER, and DIANE P. WOOD, Circuit Judges.

On Petition for Rehearing

PER CURIAM.

I&M Rail Link has filed a petition for rehearing en banc, asserting that our decision conflicts with *Texas & P. Ry. v. Angola Transfer Co.*, 18 F.2d 18 (5th Cir.1927), and *Seaboard Airline R.R. v. Pan American Petroleum & Transport Co.*, 199 F.2d 761 (5th Cir.1952). According to I&M Rail Link, each of these cases stands for the proposition that the Coast Guard's finding under the Truman-Hobbs Bridge Act of 1940, 33 U.S.C. §§ 511-23 that a bridge poses an "unreasonable hazard to navigation" must be ignored in admiralty litigation, and in particular that such a finding does not affect the rule of *The Oregon*, 158 U.S. 186,

192-93, 15 S.Ct. 804, 39 L.Ed. 943 (1895), that the moving vessel is presumptively at fault in any allision.

Neither of these cases mentions the Truman-Hobbs Bridge Act or *The Oregon*, so it is difficult to see how they stand for the proposition I&M Rail Link attributes to them. *Angola Transfer*, decided 13 years before the statute's enactment, could not have any bearing on its interpretation. What the two cases have in common with ours is that in each an administrative official had issued an order to renovate the bridge. That is also the limit of the overlap. In *Angola Transfer* the court of appeals held after a full trial that the renovation was unrelated to the accident. No such finding has been (or could be) made in this case, which was decided on cross-motions for summary judgment.

Seaboard likewise was decided after a trial. The Secretary of War had ordered the bridge's span to be increased so that the Port of Savannah could accommodate larger ocean going vessels. This did not imply that the bridge posed safety hazards to the smaller vessels that had long been using the port. Moreover, the court of appeals did not conclude that a renovation order should be ignored; it held, instead, that such an order is not conclusive on the trier of fact, not only because it is issued ex parte but also because it does not establish that a particular shortcoming caused a given allision. We reached the same conclusion: the facts underlying the Coast Guard's decisions concerning the Sabula Bridge imply that shortcomings in its design may have played a causal role in the allision, but whether this is so (indeed, whether the design is deficient) is for the trier of fact.

All members of the panel have voted to deny the rehearing. No judge has called for a vote on the petition for rehearing en banc, which is denied.